IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 73-67

HUBERT WHEELER, *et al.*,

Petitioners,

v.

ANNA BARRERA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF UNITED STATES CATHOLIC CONFERENCE, AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

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INTRODUCTORY STATEMENT

The applicable constitutional and statutory provisions, the regulations involved and the opinions of the courts below are sufficiently set out in the briefs filed by the petitioners and respondents. The facts of record in this case are also stated in the briefs filed by the opposing parties and this *amicus* accepts them for the purposes of

its own brief.[1] Petitioners and respondents have consented in writing to the filing of this brief by the United States Catholic Conference, Incorporated.[2] These have been filed with the Clerk.

IDENTIFICATION AND INTEREST OF THIS AMICUS

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications, and public affairs.

Of special relevance in light of the issues presented in this case, is that the membership of the Roman Catholic Church in America has organized, and continues to operate, a substantial system of private nonprofit schools at the elementary and secondary levels in the United States. In 1972-1973, there were 10,534 such schools, enrolling 3,789,723 students. These schools have been most commonly located in urban areas in the past and

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[1] There appears to be some disagreement between petitioners and respondents with respect to certain alleged facts. (Respondents' Brief, pp. 24-25.) To the extent that any of these disputed facts are material to the issues before the Court, the record and the pertinent regulations would appear to support the respondents' understanding of them.

[2] Hereinafter usually referred to as "USCC."

this remains largely true today. Almost 50% of all Catholic schools are located in urban and inner city areas. Nearly 1,000,000 students are enrolled in Catholic schools in inner city areas where heavy concentrations of the educationally disadvantaged childern are found. In the Nation's twenty largest cities, nearly two of five school children are enrolled in nonpublic schools, of whom about 80% are in Catholic schools. In some rural pockets of poverty, Catholic schools are the only ones available. Racial and ethnic groups include the American Negro, American Indian, Oriental American, and the Spanish surnamed.

Catholic leaders have expressed a commitment to continue and endeavor to expand the services to non-public school students in the poverty areas served by these schools. The American Catholic Bishops said recently:

> "Education is a basic need in our society, yet the schooling available to the poor is pitifully inadequate. We cannot break the vicious cycle of poverty producing poverty unless we acheive a breakthrough in our educational system. Quality education for the poor, and especially for minorities who are traditionally victims of discrimination, is a moral imperative if we are to give millions a realistic chance to achieve basic human dignity. Catholic school systems, at all levels, must redouble their efforts, in the face of changing social patterns and despite their own multiple problems, to meet the current social crisis."[3]

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[3]Statement of the National Conference of Catholic Bishops on *National Race Crisis*, April 25, 1968, pp. 4-5.

It is the concern of USCC that these services to our Nation's educationally deprived children be expanded and strengthened in the name of humanity. Services and equipment provided under public auspices by the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e)[4] greatly improve the educational opportunities of these children. It is the national purpose to break the vicious circle of poverty produced by poverty by the education of the disadvantaged so as to permit them to live meaningful and productive lives. This supreme objective would be adversely affected should this federal assistance be forbidden to the more than 1,000,000 educationally deprived children attending nonpublic, church related schools.

QUESTIONS PRESENTED

In their statement of the questions presented, petitioners tender a question not presented by the record in this case. Specifically, they ask that the Court decide whether the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e(a)(2)) "require[s]"[5] that the same special instructional services made available to educationally deprived children in public schools during regular school hours also be made available to educationally deprived children in nonpublic, church related schools during regular school hours. Whether ESEA "requires" the performance of special instructional

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[4] Hereinafter usually referred to as "ESEA."

[5] Petitioners' Brief, p. 5.

services by publicly employed personnel on nonpublic school premises during regular school hours for the assistance of educationally deprived children attending nonpublic, church related schools is not a question which can fairly be drawn from the facts out of which the instant case emerges. Accordingly, this *amicus* has reframed the statutory construction issue.[6] That issue, as restated, and the other questions presented, in the view of this *amicus* are:

1. Whether, given the statutory authorization in 20 U.S.C. 241e(a)(2) for special educational services for educationally deprived children in nonpublic schools, and given the special situation in Missouri where dual enrollment is forbidden by state law, the Eighth Circuit erred in holding that if special remedial instructional services funded under ESEA for educationally deprived children are performed by publicly employed personnel in the public schools during regular school hours, educationally deprived children attending nonpublic, church related schools are entitled to, and the public educational authorities must provide, a program of special services of a quality, scope, and opportunity for participation *comparable* to the special services afforded the educationally deprived children attending public schools?

2. Whether, on the factual record of this case, the Court of Appeals abused its judicial discretion in holding

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[6] Although restated, the question is one which is "fairly comprised" within the petitioners' statement of the questions presented. Rule 40-1(d)(1) of the Supreme Court Rules.

that petitioners' claim that the Establishment Clause of the First Amendment prohibits the performance by publicly employed personnel of special remedial services for educationally deprived children on the premises of nonpublic, church related schools during the regular school day is not ripe for adjudication at this time?

3. Whether the Establishment Clause of the First Amendment is violated by the employment of public personnel to perform special instructional services, including remedial reading and remedial arithmetic, to assist educationally deprived nonpublic school children on the premises of nonpublic, church related schools during the course of regular school hours?

SUMMARY OF ARGUMENT

I.

A. The legislative history of ESEA demonstrates that it was Congress' clear intention that the educationally deprived children of America were to be afforded the benefits conferred by ESEA without discrimination based on their school attendance. Thus, Congress intended that educationally deprived children attending nonpublic schools, including church related schools, be afforded special remedial instructional services comparable to those provided by the local educational authorities to children attending public schools.

B. Congress' original intention that educationally deprived children attending nonpublic schools were to receive comparable benefits under the Act is confirmed by the post enactment history of the statute. Thus, from the beginning, the regulations promulgated by the United States Office of Education to implement ESEA have required that educationally deprived children attending

nonpublic schools must be provided genuine opportunities to share in the benefits which the statute provides. It is also clear from the annual reports of the National Advisory Council on Education for Deprived Children to the President and the Congress that this statutorily created Congressional watchdog also accepted the view that Title I of ESEA was designed to aid all educationally disadvantaged children and to provide special services to educationally deprived nonpublic school children on a comparable and nondiscriminatory basis.

C. Since its original enactment in 1965, ESEA has been amended by Congress without any change in the original statutory language providing for assistance to educationally deprived children attending nonpublic schools. In subsequently amending the law, Congress acted with full knowledge that both the Office of Education and the NACEDC had interpreted 20 U.S.C. e(2)(a) to require that the special services programs authorized by the statute are to be extended to educationally deprived children attending nonpublic schools.

D. The attorneys general of a large number of states, including Missouri, have taken the position that, since ESEA is financed by federal funds, considerations of state constitutional and statutory law are not relevant. In determining that the ESEA benefits may be extended to children attending nonpublic, church related schools without regard to state law, the conclusions of the state attorneys general are in accord with the fiscal policy of the federal government which does not permit the co-mingling of ESEA funds with state funds.

E. By a state court interpretation of its compulsory attendance law, Missouri has outlawed the dual enrollment of public and nonpublic school children during

regular school hours. At the same time, Missouri is providing special remedial instruction services in the public schools for its educationally deprived public school children. Under the unique situation which exists in Missouri, therefore, it is legislatively required in order to achieve comparability of treatment, and constitutionally appropriate, to provide special remedial educational services to educationally deprived children in nonpublic, church related schools.

F. Language similar to that of 20 U.S.C. 241e(a)(2) has been used in a number of federal statutes subsequently enacted to provide assistance, including remedial instructional services, to handicapped children, children of limited English speaking ability, and minority isolated children attending nonpublic schools. These statutes express a purpose which now has become basic Congressional policy. That is, the educationally deprived child, the handicapped child, the child of limited English speaking ability, and the minority isolated child are to be treated comparably and equitably, whatever the schools they may attend.

II.

In exercising their judicial discretion by refusing to pass upon the Establishment Clause issue advanced by the petitioners, the Court of Appeals for the Eighth Circuit was adhering to the holdings of this Court which caution that constitutional adjudication is to be avoided where the record is inadequate to permit the informed and responsible adjudication which an important constitutional issue always merits. *Powell v. Texas*, 392 U.S. 514, 521 (1968). That precautionary precept has been followed in the State-Church field of constitutional law. *Board of Education v. Allen*, 392 U.S. 236, 248 (1968).

Despite the plaintiffs' heavy but irrelevant reliance on a law review article, and their attempt to stretch the doctrine of judicial notice to unprecendented lengths, the fact is that at the present time there is no program of special remedial instructional services provided for nonpublic school children which is now in operation in Missouri. Thus, the important constitutional issue which the petitioners attempt to raise in this Court is unaccompanied by facts sufficient to serve as a predicate for its resolution.

III.

If, however, this Court should deem it appropriate to answer the question of the constitutionality of the special remedial instructional services on nonpublic school premises that the Court of Appeals approved in accordance with the provisions of Title I of ESEA, this *amicus* submits that the only appropriate answer is an affirmative one.

A. The net result of the "school aid" cases decided so far by this Court is that some forms of public assistance to the secular education of children attending church related schools are constitutional and some are not. Four kinds of assistance have been specifically declared constitutional: buses, books, lunches and health services provided in common to all students. *Lemon v. Kurtzman*, 403 U.S. 602, 616-17 (1971). Seven kinds of assistance have been declared unconstitutional. *Lemon v. Kurtzman, supra, Levitt v. Committee*, 413 U.S. 472 (1973), *Committee v. Nyquist*, 413 U.S. 756 (1973), and *Sloan v. Lemon*, 413 U.S. 825 (1973).

The seven types of assistance declared unconstitutional by this Court shared one common characteristic: they were given only to nonpublic schools or their teachers or

the parents of the children attending them. The four types of assistance established as constitutional by the decisions of this Court share exactly the opposite characteristic: they are provided to all schools or all students, both public and nonpublic. Title I of ESEA and the special remedial instructional services approved thereunder by the Court of Appeals for the Eighth Circuit in this case provide benefits for *all* educationally deprived children, both public and nonpublic.

B. The mere fact, however, that a program is general, covering both public and nonpublic school students, is not sufficient to guarantee constitutionality. *Norwood v. Harrison*, 413 U.S. 455 (1973). The decisions of this Court make it clear that for nonpublic school students to participate in publicly provided educational services, the services must not only be provided to all students but they must also be "secular, neutral and nonideological." is only in this way that the participation of church related school students can pass the purpose-effect-entanglement test of the No Establishment Clause.

Application of this three-pronged test to the remedial instructional services involved in this case shows that the participation of church related school students does not offend the Establishment Clause. The secularity of the Congressional purpose in enacting Title I of ESEA and of including educationally deprived children in church related schools in its programs is both conceded by petitioners and overwhelmingly clear from the legislative history. The secularity of the primary effect of the actual operation of Title I projects is proven by two considerations: (1) educationally deprived children receive remedial instruction, wholly by publicly employed personnel, in reading and arithmetic, subjects that are indispensable to a secular education, and (2) there is no

"direct and substantial advancement of religion". *Committee v. Nyquist*, 413 U.S. 756 (1973), because there is no funding in Title I projects of any of the *basic* or *actually existing* programs of instruction in church related schools.

The third prong of the No Establishment test is "excessive entanglement." Given the factual posture of this case, in which the petitioners have persistently prevented the implementation of *any* remedial instruction programs under Title I of ESEA on *any* church related school premises under *any* circumstances, the Court has been put in an almost hopelessly conjectural position with respect to the application of the entanglement test. Petitioners are arguing, in effect, that the entrance of publicly employed educational personnel on church related school premises is, on its face, "excessive entanglement" of government with religion. This is manifestly false because from *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) to date, this Court has often reiterated the right of the state to regulate and inspect church related schools. Church related schools are not sacred enclaves on which government personnel are forbidden to enter for any and all purposes. The No Establishment Clause does not excommunicate any religious institution from secular public services.

There is no serious potential for excessive entanglement, either administrative or political, in this case. Title I projects do not involve the federal or state governments in surveillance of any of the regular classes in a church related school. They do not necessitate any judgments about what is secular and what is religious in those classes. Title I teachers are all publicly employed personnel. The design, operation and supervision of Title I projects is wholly under public control. The only role

played by church related school personnel is to provide needed assistance to public officials to make certain that the projects will reach all similarly deprived children and to provide a place in the church related school where the project may be conducted.

The danger of excessive political entanglement arises when a particular educational program is divisive because it benefits relatively few religious groups. Title I of ESEA benefits all educationally deprived children, regardless of their religion and of the school they attend. This Court has never held any educational program unconstitutional *solely* because of excessive political entanglement. To do so would involve the Court in a contradiction, because it would mean that it would be unconstitutional to *seek* what it is constitutional to *receive*.

C. Petitioners' contention that the facts of this case are indistinguishable in substance from the facts of *Lemon v. Kurtzman*, *supra*, and its companion cases is also without merit. We have already indicated many constitutionally decisive distinctions. Title I is general in its coverage of educationally deprived children. Title I remedial instruction projects are wholly under public operation as well as public control. Title I provides no funds whatever for the regular operations of church related schools. Title I creates no potential for excessive administrative entanglement or political devisiveness along religious lines.

D. In conclusion, this *amicus* submits that, in addition to passing the No Establishment Clause test and to being in harmony with the existing precedents of this Court, Title I remedial instruction programs on nonpublic as well as public school premises achieve important positive constitutional values through (1) genuinely assisting genuinely deprived children and (2) accommodating the

governmental role in education to the rights of parents, to the free exercise of religion and to academic freedom and the role of private institutions in American education.

ARGUMENT

I.

BOTH THE LEGISLATIVE AND POST ENACTMENT HISTORY OF ESEA SUPPORT THE CONCLUSION THAT THE ACT WAS INTENDED TO REQUIRE COMPARABLE SPECIAL INSTRUCTIONAL SERVICES FOR EDUCATIONALLY DEPRIVED CHILDREN ATTENDING NONPUBLIC SCHOOLS.

In this section of its brief, USCC shows that both the legislative and post enactment history of the Act demonstrate a firm and undeviating Congressional intention that educationally deprived children who attend nonpublic schools, including church related schools, are to be afforded special services comparable to those provided for educationally deprived children attending public schools. The respondents have discussed the legislative history of the statute in some detail and this *amicus*, therefore, has attempted to avoid repetition of that discussion.

A. *The Legislative History of the Act.* Although the legislative history of ESEA is not absolutely free of ambiguity, it demonstrates a clear Congressional intention that the educationally deprived children of the Country are to be afforded the benefits conferred by the statute without discrimination based on their school attendance.

The Elementary and Secondary Education Act of 1965 constituted a major national effort to upgrade education

in the United States. Indeed, the goal of the Congress in passing it was to provide "*Full Educational Opportunity.*"[7] President Johnson's Message to Congress on Education of January 12, 1965 on the occasion of the introduction of the education bill stated:

> "Every child must be encouraged to get as much education as he has the ability to take. We want this not only for his sake but for the nation's sake."[8]

The intended beneficiaries of this legislation were a special class, namely, educationally disadvantaged children, whoever they might be and wherever they might be found. As President Johnson said:

> "Federal action is needed to assist the states and localities in bringing the full benefits of education to children of low income families. *Assistance will be provided, for the benefit of all children within the area served,* including those who participate in shared services *or other special educational projects.*" (Emphasis added.)[9]

Similar language appears in the President's budget message of January 25, 1965, where he emphasized that federal aid is essential in order to end the situation in which children can be handicapped for life because of lack of adequate educational opportunity.[10]

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[7] 21st Annual Congressional Quarterly Almanac 1374 (1965).

[8] *Ibid.*

[9] *Ibid.*

[10] *Id.* at 1356.

In view of the fact that ESEA represents a major effort, based on a national consensus, to enable the youth of the Nation to realize their educational potential, it would mock the statute's avowed purpose to conclude that the Congress intended to treat children who fall within the same legislative class in a different way because of the school which they might happen to attend. Respondents correctly have contended from the inception of this litigation that educationally deprived children attending nonpublic schools are entitled to assistance comparable to that which is given to children in public schools for they have the same needs and fall within the same class which the legislation was intended to help.

The Reports of the House and Senate Committees also emphasize the proposition that special educational and instructional services are to be extended to all educationally deprived children.[11] For example, the House Report on the bill stated:

> "Thus, the bill does anticipate broadened instructional offerings under publicly sponsored auspices which will be available to elementary and secondary students who are not enrolled in public schools."[12]

The Report of the Senate Committee on Labor and Public Welfare expresses the same broad purpose:

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[11]Respondents' Brief, pp. 65-67.

[12]H.R. Rep. No. 143, 89th Cong. First Sess. 7 (1965).

"... and we will liberate each young mind–in every part of this land–to reach the furthest limits of thought and imagination."[13]

There are other relevant items of the legislative history of the Act which are referred to in the respondents' brief and which point up the intention to provide assistance–significant assistance–to all children, regardless of the school which they attend. Admittedly, Congress did not take the position that any specific type of assistance had to be provided by the local educational agencies. Discretion was given them to adopt the most appropriate program or programs. The Congress did not intend however, that the local educational agencies could abuse their discretion by discriminating between public and nonpublic educationally deprived children on the basis of school attendance. Such discrimination would violate directly the pervading purpose of the legislation. Moreover, such an invidious classification of children similarly situated would be inconsistent with the position taken by this Court in *Everson v. Board of Education*, 330 U.S. 1 (1947), where, speaking through Mr. Justice Black, it stated:

"... on the other hand, the language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their religion. Consequently, it cannot exclude Catholic, Lutherans" ... or the members of any other faith because of their faith or lack of it from receiving the benefits of public welfare legislation."[14]

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[13]S. Rep. No. 146, 89th Cong., First Sess. 4 (1965).

[14]330 U.S. at 16.

B. *The Post-Enactment History of ESEA Manifests Congressional Confirmation of the Statute's Purpose to Provide Comparable Special Services to Educationally Deprived Nonpublic School Children.* From the above review of the legislative history of ESEA and the unmistakable emphasis which it places upon aiding a special class of educationally deprived children, it is obvious that the Executive Branch, which submitted and supported the bill and the Congress which enacted the statute, both intended that *all* educationally deprived children were to receive comparable benefits under the Act. This *amicus* now shows in this section of its brief that this intention is confirmed by: (1) the interpretation afforded the Act by the Commissioner of Education; (2) the construction of the statute adopted, and reported to the Congress, by its statutorily established watchdog, the National Advisory Council on Education of Disadvantaged Children;[15] and (3) the re-enactment by the Congress, without change, but aware of their administrative construction, of the critical legislative provisions mandating aid to nonpublic school children who are educationally deprived.

1. *The Regulations of the Office of Education*

ESEA is a statute which was both novel and broad in vision, conception, purpose and reach. It was the Office of Education, under the jurisdiction of the Department of Health, Education and Welfare, which was entrusted

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[15]Hereafter usually referred to as the "Council" or the "NACEDC."

with the primary administration of this innovative law. From the beginning, the regulations promulgated by the Office of Education to implement ESEA have required that educationally deprived children attending nonpublic schools must be provided genuine opportunities to share in the benefits offered by the Act.[16] Admittedly, the Commissioner's regulations are not conclusive on the point. They do, however, carry great weight, for this "Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Perkins v. Matthews*, 400 U.S. 379, 381 (1971); *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-627 (1971).

That canon of statutory construction would seem especially applicable here. The Office of Education played a very significant part in the drafting of ESEA, including those provisions which extend its benefits to educationally deprived children attending nonpublic schools. The Office of Education was well aware that these provisions were an integral part of the breadth of vision of ESEA. The views of a governmental agency which assisted in developing a statute are entitled to great weight in its interpretation. *Adams v. United States*, 319 U.S. 312, 315 (1943). And an administrative practice has particular weight when it involves a contemporaneous interpretation of a statute by the officials who were "charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Nor-*

[16] 45 C.F.R. 116.19 (1972).

wegian *Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933). *Cf. United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956). In any choice between the interpretation of the Act's requirements by the Office of Education, so far as they apply to the statutory benefits to be afforded nonpublic school, educationally deprived children, and that argued for by the petitioners, the Office's interpretation should occupy a preferred position.

2. *The Interpretation of the Act and Reports to the Congress by the National Advisory Council on Education of Disadvantaged Children*

Section 212 of the original ESEA provided for the establishment of a National Advisory Council on Education of Disadvantaged Children.[17] Although the Council was not charged with actual enforcement of the Act, it was given important responsibilities with respect to it. The Council's primary function was to review the administration of the legislation and to report annually to the President and the Congress. NACEDC was also given authority to authorize basic research in order to secure relevant data. It is fair to say that since its creation the Council has kept a watching brief over the administration of the Act and carefully reported the results of its surveillance to the Congress annually.

The Council's annual reports refer to various aspects of the administration of the statute and, we believe, constitute an important and contemporaneous source of

[17] 20 U.S.C. 241(l).

interpretation as to its meaning. The first report of the Council was on March 31, 1966. In it, the Council stated:

> "There are, however, some early indications that the disadvantaged children in private and parochial schools are receiving less help than Title I intended for them.... It is the Council's feeling that *the program will continue to be effective only as long as it is administered to reach all needy children wherever they are found.* (Emphasis added.)[18]

Additional credence was given to this report of the Council by reference to it in a report of the House Committee on Education and Labor which accompanied the 1966 amendments to ESEA.[19] In its 1969 report, the Council returned to a consideration of the participation of nonpublic school children under Title I. It stated:

> "The concept of using federal funds to attack educational handicaps of disadvantaged children *whether in public or private schools* has gained increasingly widespread and solid support since Title I first went into operation. *Although ESEA has been amended in 1965, 1966, and 1967, the desire of Congress to help disadvantaged nonpublic school children has remained firm.*" (Emphasis added.)[20]

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[18]Report of the National Advisory Council on Education of Disadvantaged Children (1966), p. 21.

[19]H. Supp. Rep. No. 1814, part 2, 89th Cong., 2nd Sess. 3 (1966).

[20]Report of the National Advisory Council on Education of Disadvantaged Children (1969), p. 27.

The Council's report for 1969 also contained an extensive analysis of the participation of nonpublic school children under Title I and cited the conclusions of special research teams. In its summary of findings and recommendations the Committee stated:

> "... most of the cities studied show varying degrees of cooperation involving nonpublic school officials in planning Title I programs; more often than not they offer nonpublic school children participation only in scattered programs at the convenience of public school Title I administrators."[21]

The Council then offered seven basic recommendations in order to improve participation of educationally disadvantaged children enrolled in nonpublic schools.[22]

The Report of the Council for 1973 expressed continued concern that in some areas children in nonpublic schools were not receiving comparable special remedial services. It stated:

> "The Council has consistently supported the need for financial support to the educational programs of disadvantaged children *wherever they attend school.* Past Council reports have recommended that special arrangements be made to deliver remedial services to Title I eligible children who attend nonpublic schools." (Emphasis added.)[23]

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[21] *Id.* at 41.

[22] *Id.* at 42-43.

[23] Report of the National Advisory Council on Education of Disadvantaged Children (1973), p. 35.

Finally, the 1973 Report concludes with a specific reference to the case at bar, stating:

> "The NACEDC supports the position of the Office of Education to submit an *amicus curiae* brief in an instance like this. The Court's decision was in favor of Anna Barrera and also that public school teachers can teach on premises of nonpublic schools, if that is the only way comparable services can be provided."[24]

These few citations to the Reports of NACEDC show that the Council has continually recognized, and has so reported to the Congress, the fact that Title I of ESEA was designed to aid all educationally disadvantaged children and to provide such services on a comparable and nondiscriminatory basis.

3. *Congressional Construction of the Statute Since Its Passage.*

It is a traditional canon of statutory construction that where an act of Congress has received a consistent administrative construction of which the Congress is aware and the statute thereafter is re-enacted without altering the prior administrative interpretation, that intrepretation is generally accorded considerable weight and usually regarded as a presumptively correct interpretation of the statute. *United States v. Wyoming*, 331 U.S. 440, 452 (1947). This canon would appear particularly relevant in the case of ESEA. Here, the Congress

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[24] *Id.* at 37.

must not only be presumed to be aware of the interpretation given the statute by the Office of Education but further to be cognizant of the interpretation of the statute, as well as aware of the annual reports furnished it, by its statutory watchdog, NACEDC. With such knowledge of administrative interpretation and practice the actions of Congress following the enactment of ESEA have a special relevance in determining whether the construction which the Court of Appeals placed on Section 241e(a)(2) was correct.

The same Congress that enacted the Elementary and Secondary Education Act amended it in its second session (1966). It also took this occasion specifically to re-emphasize the proposition that nonpublic school students could receive special instructional services either on public school premises or on the premises of the school which they attend. If, however, such students received special instructional services on nonpublic school premises there were certain limitations which did not apply when they went to the premises of a public school. For example, on nonpublic school premises health, transportation and remedial services were permissible, but general teaching services were not. The Report of the House Committee on Education and Labor accompanying the 1966 amendments states:

> "There is no basis for confusion as to the remedial services limitations we have placed on programs covering nonpublic school children. It was not then, nor is it now, intended that the limitation should apply to the services available to children enrolled in nonpublic schools who participate in projects on public school premises or to children enrolled in public schools. The limitation to such specialized services as health, therapeutic, and remedial services was, and is, not intended to apply

to services made available to disadvantaged children on public premises."[25]

In 1966, the Senate Committee on Labor and Public Welfare filed a report accompanying legislation to revise Section 203(a)(1) of the original Act so as to permit grants to the Department of Interior for the benefit of Indian children. In this connection, the report stated that the amendment was being proposed with

> "the expectation that such children who may be in attendance at mission schools on the reservations would share, to the same extent and degree, in the educational benefits provided by the Bureau of Indian Affairs Schools as are available to nonpublic school children elsewhere in the area serviced by Title I public schools."[26]

The same report then states that in order that there may be a better appreciation of the program available to children in nonpublic schools under Title I, it was restating the language contained in Senate Report No. 146, April 6, 1966, pp. 11-12. This language, among other things, states that:

> "Thus, the Act does anticipate broadened instructional offerings under public sponsored auspices which will be available to elementary and secondary school students who are not enrolled in public schools."[27]

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[25]H. Rep. No. 1814, 89th Cong. 2d Sess. 4 (1966).

[26]S. Rep. no. 1674, 89th Cong. 2nd Sess. 12 (1966).

[27]*Id.* at 13.

This interpretation should be read in light of the fact that the Congress restated Subsection 205(a)(2) of Title I (now 20 U.S.C. 241e(a)(2)) in the process of providing assistance for handicapped children under Title VI of ESEA (20 U.S.C. 1413(a)(2)). This is more than a perfunctory re-enactment of existing legislation; it is the deliberate use of the same language of Subsection 205(a)(2) of Title I in a new title. The correctness of an interpretation given a statute by the agency charged with its enforcement is buttressed when it appears that Congress with "full knowledge" of that interpretation has made significant additions to the statute without amending it to depart from the agency's view. *Farmers Educational & Co-op Union v. WDAY, Inc.*, 360 U.S. 525, 533 (1959). Thus, the 1966 amendments of ESEA together with the statements in the Committee Reports of the House and Senate accompanying those amendments provide convincing evidence of the intent of Congress and indeed emphasizes its original desire that comparable special services should be extended to children in nonpublic schools by virtue of 20 U.S.C. 241e(a)(2).

4. *Construction of the Act by State Authorities Supports the Interpretation It Has Received at the Federal Level.*

In the last two decades, especially in civil rights litigation, this Court has consistently reaffirmed that State law may not be interposed to frustrate or deny either constitutional rights or those provided under the auspices of important national legislation. *See, e.g., Brown v. Board of Education*, 349 U.S. 294 (1955). This indispensible tenet of American federalism has been recognized and applied by a large number of states which

have taken the position that, since ESEA is financed by federal funds, considerations of state constitutional and statutory law are not relevant. Illustrative is an opinion issued by the Attorney General of the State of New York on July 15, 1965 in which he held:

> "The prohibition contained in the New York Constitution would not be involved if the entire cost of the programs in this state—including administration thereof—is paid out of federal grants without the use of any state or local property or credit or public money at any stage of the program, and if the federal monies are at no time commingled with monies of the state or local subdivision thereof."[28]

The Attorney General of Kentucky stated the point forcefully in an opinion dated July 21, 1966. He said:

> "We are of the opinion that the state and local Boards of Education and the State Department of Education are under Public Law 89-10. Likewise only agencies and instrumentalities designated by the Congress to effectuate the present Act. It might be said that these agencies function as trustees or custodians of the federal funds (and property purchased therewith) made available for these programs by the federal government and that in such capacity they are simply administering and disbursing federal funds to carry out the objectives of the federal legislation. In reaching this conclusion we have necessarily determined that the funds provided here essentially retain their character as

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[28]Op. Att'y. Gen. 36 (N.Y. 1965).

federal funds though placed in the hands of state and local agencies. We think this is implicit in the Act which retains authority in the Commissioner to revoke, withdraw or set-off funds for noncompliance with the Act and with programs approved thereunder."[29]

Formal opinions along these lines have also been rendered by a number of other States.[30]

Moreover, despite petitioners' contentions to the contrary, the State of Missouri also has followed this general rule. On January 29, 1970, the Attorney General for the State of Missouri rendered the following opinion:

> "It is the opinion of this office that the Elementary and Secondary Education Act of 1965 provides that, under certain circumstances and to the extent necessary, public school personnel, paid with federal funds pursuant to this program, may be made available on the premises of private schools to provide certain special services to eligible children and that *Missouri law would not prevent public school personnel, paid with federal funds, from providing these services on the premises of a private school.*" (Emphasis added.)[31]

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[29]O.A.G. 65-865 (Ky.).

[30]Nevada, OAG 276, November 5, 1965; Colorado, OAG 65-3883, August 9, 1965; New Jersey, November 29, 1965; Oregon, OAG 61-62, July 29, 1966; Puerto Rico, May 20, 1966; Georgia, July 7, 1965; Arizona, October 4, 1965; Iowa, May 3, 1966; Pennsylvania, May 10, 1967; Wyoming, January 21, 1966.

[31]Op. Att'y. Gen. No. 26-9 (Mo. 1970), cited in the Court of Appeals opinion below, 475 F.2d at 20.

This opinion is buttressed by the fact that the Constitution of the State of Missouri expressly provides, that:

> "Money or property may also be received from the United States and be redistributed together with public money of this State for any public purpose designated by the United States."[32]

Accordingly, any general statements which appear in scattered references in the floor debate in Congress on this issue which might be read to imply that state law would be controlling, must be examined in light of the consistent interpretation of the chief legal officers of the states who concluded that state constitutional limitations do not limit a federally funded program where there are no matching provisions involved.

This conclusion is strengthened by the fiscal policy of the federal government which does *not* permit the commingling of ESEA funds with state funds. When a state's allotment is determined, an authorization (entitled a letter of credit) is issued to the State Department of Education which permits the state to draw on allotted federal funds. The letter of credit authorizes a maximum amount which can be drawn each month. And the regional Federal Reserve Bank is designated as the depository from which the funds may be drawn. Funds are obtained by the Department upon request in accordance with the letter of credit. The Federal Reserve Bank transfers the requested amount to a bank designated by the state where it is deposited to the credit of

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[32] Mo. Const., Art. III, Sect. 38(g).

the State Treasurer in a special account for federal funds. Thereafter, the Department of Education issues vouchers to the Secretary of the State for the payment of the claims arising under the state plan.[33]

D. *Summary.* Thus, the legislative history of the statute, its post-enactment history and the interpretation afforded it by federal and state authorities are all consistent with the proposition that federally provided funds may be used to offer special instructional services performed by publicly employed personnel on the premises of nonpublic schools, including church related schools. By a state court interpretation of its compulsory school attendance law, Missouri has outlawed the dual enrollment of public and nonpublic school children. At the same time, Missouri has emphasized the desirability of providing special instructional services for its educationally deprived public school children. Under these particular, and indeed unique, circumstances, it is legislatively required and constitutionally appropriate to extend comparable special services to educationally deprived children in nonpublic schools as a similar need for those services exists. Actually, under the unusual situation which now prevails in Missouri it is the only alternative available which would comply with the national purposes of ESEA, *i.e.*, that *all* educationally deprived children be given a genuine opportunity to share in its benefits.

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[33]Letter of Credit Financing System, Office of Education, Implementing Instructions, pp. 1-4. "The Letter of Credit is, in essence, a transfer of trust between the Federal Government and the recipient agencies." *Id.* at 2.

E. *Related Statutes Also Aid in the Proper Construction of What ESEA was Intended to Achieve.* A final guide to the proper interpretation of ESEA, so far as it extends benefits to educationally deprived children attending nonpublic schools, is provided by reference to several other federal statutes which have used the original language of Section 205(a)(2) of Title I.[34] These statutes constitute the basic authority for providing federal assistance to various categories of disadvantaged public and nonpublic school children. For instance, reference has already been made to the fact that the language of Section 205(a)(2) was repeated in Title VI of the Elementary and Secondary Education Act and formed a basis for providing assistance to handicapped children in nonpublic institutions. (*supra*, at 25). Identical language is also employed in Section 705(b)(3) of Title VII of the Elementary and Secondary Education Act which related specifically to bilingual education programs.[35] Under this language, public school teachers are authorized to provide instructional services for the special educational needs of children of limited English speaking ability. Again, the same language appears in Section 173(a)(6) of the Co-Operative Vocational Education Act, designed to prepare young people for employment through programs which provide a meaningful work experience combined with formal education.[36]

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[34]Now 20 U.S.C. 241e(a)(2).

[35]20 U.S.C. b-3(b) 3(B).

[36]20 U.S.C. 1413(9)(2).

The latest utilization of the Title I language is reflected in Section 710(a)(12) of the Emergency School Aid Act (ESAA), which is designed to eliminate or prevent minority group isolation and to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools.[37] In order to clarify the full meaning of the controlling language taken from Section 205(a)(2) of ESEA, the Congress enumerated specific activities authorized thereunder in Section 707(a) of ESAA. The first activity provided for is

> "*remedial services, beyond those provided under the regular school program* conducted by the local education agency." (Emphasis added.)[38]

Another clarification of the language first used in Section 205(a)(2) of ESEA is language in the ESAA which requires that the assistance to minority isolated children attending nonpublic schools be "made * * *on an equitable basis."[39] Many minority isolated children in the inner city areas of major American cities who attend nonpublic schools, including religious related schools, are currently receiving benefits under ESAA which, except for its emphasis on the minority isolated child, is a statute which may be regarded *in pari materia* with ESEA.

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[37]20 U.S.C. 1609(a)(12).

[38]20 U.S.C. 1606(a)(1).

[39]20 U.S.C. 1609(a)(12).

From the statutes to which we have just referred, it is apparent that the original language of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e(a)(2)) was not merely an isolated attempt to provide assistance for disadvantaged children in nonpublic schools. On the contrary, that language expresses a purpose which now has become basic Congressional policy. That is, the educationally deprived child, the handicapped child, the child of limited English speaking ability and the minority isolated child, are to be treated comparably and equitably whatever the school he or she may attend. To construe the statute in the narrow fashion urged by the petitioners would be an unjustified retreat from that policy and would cast a long shadow over these Congressional programs.

II.

PETITIONERS' CLAIM OF UNCONSTITUTIONALITY IS NOT RIPE FOR ADJUDICATION

Plaintiffs assert that assigning publicly employed personnel to perform special remedial instructional services on the premises of nonpublic, church related schools during regular school hours violates the Establishment Clause of the First Amendment.[40] Genuine doubts exist concerning the plaintiffs' standing to press such a claim, one which they expressly asserted for the first time in the Court of Appeals.[41] Quite apart from these reservations,

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[40]Petitioners' Brief, pp. 26-41.

[41]Respondents' Brief, pp. 82-88.

however, is the compelling concern that the important constitutional issue which the petitioners press upon the Court for decision is not ripe for review in the factual context of this case. They seek, in effect, "an advance expression of legal judgment upon issues which remain unfocused. . . ." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *see also Longshoremen's Union v. Boyd*, 347 U.S. 222, 223 (1954). And it was precisely on such grounds that the two member majority of the Court of Appeals refused to pass upon the constitutionality issue belatedly advanced by the petitioners, citing their judicial duty, or at least their judicial discretion, to "refrain from passing upon constitutional questions on an abstract or hypothetical basis."[42]

Examination of the record in this litigation supports the Court of Appeals' refusal to rule on an important constitutional question prematurely. At the present time, there is *no* program of special remedial instruction services performed on non-public school premises in operation in Missouri. Moreover, "no particular program, curriculum or service is *mandatory* under the Act." 475 F.2d at 1354. Local educational authorities may request ESEA funds for a variety of uses.[43] No specific remedial program authorized by Title I of ESEA is under attack in this litigation. Many factors would be relevant in determining whether a particular special services program

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[42]Barrera v. Wheeler, 475 F.2d 1338, 1354 (8th Cir., 1973).

[43]See the remarks of Senator Morse in which he provides an extensive list of Title I activities. 111 Cong. Rec. 7298-7299 (1965).

complied with the requirements of the Act, applicable regulations of the United States Office of Education and the Constitution.[44] In short, the important constitutional issue which the petitioners ask the Court now to decide is unaccompanied by facts sufficient to serve as a predicate for its resolution.

Petitioners' attempt in two ways to cure the shortage of determinative facts from which the case suffers. Neither, however, is permissible. First they rely very heavily on a law review article[45] purporting to be "a careful study" of the operations of Title I programs in effect in New Jersey.[46] The law review article, of course, is not a part of the record. Although a law review article may be an aid to argument, it cannot be used as a substitute for material facts in a law suit. The *opinions* of a legal commentator at or concerning the alleged operations of existing Title I programs in New Jersey cannot be converted for use as alleged *facts* purporting to show how a non-existent Title I program might operate in Missouri.

Secondly, in their effort to have the Court rule, despite the lack of a supporting factual context, that it is unconstitutional for publicly employed personnel to perform special remedial instructional services on the premises of non-public, religiously related schools, petitioners would stretch the doctrine of judicial notice

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[44]475 F.2d at 1354.

[45]LaNoue, *Church-State Problems in New Jersey: The Implementation of Title I (ESEA) in Sixty Cities, 22 Rutgers L. Rev. 219 (1968).*

[46]Petitioners' Brief, p. 11.

into one of judicial surmise.[47] For example, can the Court, as petitioners would have it do, take judicial notice that *publicly employed* special services teachers cannot be trusted to avoid the teaching of religion on the premises of a nonpublic school?[48]

The Court, of course, is not required to be "blind" to facts which "all others can see and understand. . . ." *Child Labor Case*, 259 U.S. 20, 37 (1922); *United States v. Rumely*, 345 U.S. 41, 44 (1953). Nevertheless, there are outer boundaries to the reach of judicial notice. *Witherspoon v. Illinois*, 391 U.S. 510, 518 (1968); *Black Diamond v. Stewart & Sons*, 336 U.S. 386, 397 (1949). This *amicus* respectfully suggests that these limits would be transgressed should the Court accept petitioners' factually unsupported misassumptions as to how a Title I special remedial services program *might* operate in Missouri *if* such program were in actual operation in that state. Petitioners' misapplication of the doctrine of judicial notice is an additional demonstration that the factual record in the present case "is utterly inadequate to permit the sort of informed and responsible adjudication" which an important constitutional issue always merits. *Powell v. Texas*, 392 U.S. 514, 521 (1968).

Thus, in declining prematurely to pass on the First Amendment issue advanced by the plaintiffs, the Court of Appeals was exercising sound judicial discretion and adhering to the holdings of this Court which maintain that where the factual record provides "too fragile a

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[47] *See, e.g.*, Petitioners' Brief, pp. 27, 32-33, 36-37, 39.

[48] *Id.*, at 27.

foundation for indulging in constitutional adjudication", such adjudication is to be avoided or postponed. *Poe v. Ullman*, 367 U.S. 497, 501 (1961); *Kimbrough v. United States*, 364 U.S. 661 (1961); *Powell v. Texas, supra.*

The precept of judicial self-restraint which cautions that an important constitutional issue should not be resolved on the basis of an inadequate factual record has been observed by the Court in the State-Church field of constitutional law. In *Board of Educaton v. Allen*, 392 U.S. 236 (1968), this Court, speaking through Mr. Justice White, refused, in the absence of specific evidence and based solely on judicial notice, to conclude that New York's free textbook law resulted in unconstitutional state involvement with religious instruction or otherwise violated the Establishment Clause. In particular, the Court noted that: "No *evidence* has been offered about particular schools, particular courses, particular teachers, or particular books." (Emphasis added)[49] The case at bar suffers from a similar lack of particular, material evidentiary facts on the basis of which the constitutional issue could be decided.

Finally, this *amicus* believes that the imprudence always risked by the unnecessary and premature decision of a constitutional issue is accentuated in this case when the impact or probable consequences of a decision in favor of unconstitutionality are contemplated. We already have referred to the fact that the passage of ESEA manifested a major national effort to enable the children of America to realize their educational potential.

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[49] 392 U.S. at 248.

(*Supra*, at 14.) This *amicus* also has mentioned other important statutes enacted for the purpose of assisting educationally deprived children, handicapped children, children of limited English speaking ability, and minority isolated children. (*Supra*, at pp. 30-32) Many of the special services programs initiated under such statutes might be in jeopardy if this Court were to decide the constitutional issue in the manner urged upon it by the petitioners. In the next section of this brief USCC argues that ESEA is constitutional. At this point, however, it maintains only that the enormity of the educational, cultural and social consequences which are inherent in the constitutional issue put forth by the petitioners reinforces the conclusion that the premature resolution of that issue, at this time and on the basis of the factual record in this case, would be a departure from the "best teaching of this Court's experience [which] admonishes" that an important constitutional question should not be "entertain[ed] in advance of strictest necessity." *Parker v. County of Los Angeles* 338 U.S. 327, 333 (1949); *Poe v. Ullman, supra* at 503.

III.

PUBLIC PROVISION OF THE SPECIAL REMEDIAL INSTRUCTIONAL SERVICES APPROVED BY THE COURT OF APPEALS IN ACCORDANCE WITH THE PROVISIONS OF TITLE I OF ESEA IS WITHIN THE CONSTITUTIONALLY PERMISSIBLE AREA OF SECULAR, NEUTRAL, NONIDEOLOGICAL SERVICES, FACILITIES AND MATERIALS PROVIDED IN COMMON TO ALL STUDENTS REGARDLESS OF THE SCHOOL THEY ATTEND

The basic contention of this *amicus* is that, given the structure and restrictions of Title I ESEA projects, the

special educational services at issue in this case are clearly within the constitutionally permissible area of "secular, neutral, or nonideological services, facilities, or materials" that are "supplied in common to all students" regardless of the school they attend. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971).

Four points support this contention:

(1) The controlling decisions of this Court establish that some, but not all, forms of public educational assistance to children attending church related schools are constitutional.

(2) The special educational services at issue in this case are constitutional under the established three-prong test of purpose, effect, and excessive entanglement.

(3) There are decisive constitutional differences between the type of special educational services involved in this case and the types of educational assistance that were held unconstitutional in this Court's "school-aid" decisions of 1971 and 1973.

(4) The special educational services authorized by Title I of ESEA promote important positive constitutional values through (a) the provision of aid for educationally deprived children and (b) the accommodation of parental rights in education, the free exercise of religion, academic freedom and the role of private institutions in American education.

A. *State of the Law.* In the last three years this Court has decided eleven cases involving the First and Fourteenth Amendments and education in church-related elementary and secondary schools.[50] Of these decisions,

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[50]Lemon v. Kurtzman (with Earley v. DiCenso), 403 U.S. 602 (1971); Sanders v. Johnson, 403 U.S. 955 (1971); Brusca v.

the *Lemon-DiCenso* cases of 1971 and the *Levitt, Nyquist* and *Sloan* decisions of 1973 are of controlling significance for the purposes of this case. These decisions do not, however, stand alone. They are based upon, and must be read in conjunction with, six other leading decisions of the Court: *Pierce, Cochran, Everson, Zorach, Allen* and *Walz*[51]

The net result of all these cases is that some forms of public assistance to the secular education of children attending church-related elementary and secondary schools are constitutional and some are not. For almost fifty years this Court has wrestled with the constitutional

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Missouri State Board of Education, 405 U.S. 1050 (1972); Essex v. Wolman, 409 U.S. 808 (1972); Lemon v. Kurtzman ("Lemon II"), 411 U.S. 193 (1973); Norwood v. Harrison, 413 U.S. 455 (1973); Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973); Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Grit v. Wolman, 413 U.S. 901 (1973). The Court denied certiorari in the Title I ESEA case of Nebraska State Board of Education v. School District of Hartington, 409 U.S. 921 (1973), and vacated a stay of an injunction previously granted by the Court in a state auxiliary services case, Marburger v. Public Funds for Public Schools of New Jersey, 413 U.S. 916 (1973). In addition to these elementary and secondary school cases, the Court decided two cases involving church-related colleges and universities, Tilton v. Richardson, 403 U.S. 672 (1971) and Hunt v. McNair, 413 U.S. 734 (1973), and dismissed an appeal for want of a substantial federal question in another church-related higher education case, Durham v. McLeod, 413 U.S. 902 (1973).

[51]Pierce v. Society of Sisters (with Pierce v. Hill Military Academy, 268 U.S. 510 (1925); Cochran v. Louisiana State Board

status of church related schools, the children who attend them, the parents who choose them and the teachers who teach in them. At no time has this Court ever given a flat "Yes" or "No" answer to the "aid to parochial schools" question.

Yet, the Court has been far from indecisive. Firm precedents have been established and workable guidelines have been elaborated. The resulting complexity in the law is simply the unavoidable result of the complexity of the constitutional principles involved in these cases. In the education area, the First Amendment's No Establishment and Free Exercise Clauses are in perpetual tension, the first forbidding aid or hurt to religion and the second prohibiting discrimination on religious grounds. *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947). But the First Amendment is not the only constitutional provision involved. The Due Process Clause of the Fourteenth Amendment also guarantees the right of parents to select

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of Education, 281 U.S. 370 (1930); Everson v. Board of Education, 330 U.S. 1 (1947); Zorach v. Clauson, 343 U.S. 306 (1952); Board of Education v. Allen, 392 U.S. 236 (1968); Walz v. Tax Commission, 397 U.S. 664 (1970). The Court has dealt with governmental involvement with religion in the public schools, a distinctly separate constitutional issue, on three occasions: Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948); School District of Abington Township v. Schempp, 374 U.S. 203 (1963); Epperson v. Arkansas, 393 U.S. 97 (1968). In still a third "religion and education" area, the Court has upheld the right of the Amish to an exemption from compulsory school attendance beyond the grammar school level. Wisconsin v. Yoder, 406 U.S. 205 (1972).

nonpublic schools for the education of their children. *Pierce v. Society of Sisters* (with *Pierce v. Hill Military Academy*), 268 U.S. 510 (1925). The Spending Clause of Article I, Section 8 authorizes Congress to provide for the "general Welfare" of the United States. *United States v. Butler*, 297 U.S. 1, 65-66 (1936); *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-87 (1937). Under their reserved powers the States have the right, within constitutional limits, to regulate and support the secular education of children in all schools, public and nonpublic. *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930); *Everson v. Board of Education, supra; Board of Education v. Allen, supra.*

The result of the complex interplay of these principles on various forms of public assistance to the education of children in church related schools can be summarized as follows:

(1) Government may provide the children in these schools with the same secular, neutral, nonideological services, facilities and materials that the government provides *all* school children regardless of the school they attend. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971). Established examples: Buses, books, lunches and health services. It is also clear from *Levitt v. Committee*, 413 U.S. 472 (1973), that government may pay for the costs of administering standard, secular, neutrally prepared intelligence and achievement tests to pupils in all schools, public and nonpublic.

(2) Church related schools may participate in the traditional tax exemptions accorded charitable, religious and educational organizations. See *Walz v. Tax Commission*, 397 U.S. 664 (1970).

(3) There is, accordingly, some constitutional "leeway for indirect aid to sectarian schools," because "assistance

properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others." *Norwood v. Harrison* 413 U.S. 455, 468 (1973). This "leeway" is one example of the "room for play in the joints" of church-state relationships, productive of a "benevolent neutrality," that this Court emphasized in *Walz v. Tax Commission, supra* at 669 (1970).

(4) Government may not, however, provide assistance to the secular education of children in church related schools through programs, whatever their form, that contain the following combination of characteristics: the only schools benefiting from the programs are nonpublic schools, the vast majority of which are church related and specifically Catholic schools; the assistance is either not carefully confined to the secular aspects of education in these schools or cannot be so confined without continuous governmental surveillance of teaching by parochial school teachers in these schools; and, owing to the religious narrowness of the class benefited, there is a serious potential for political divisiveness along religious lines. *Lemon v. Kurtzman, supra; Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973).

In reaching these results in the "school aid" cases, this Court has consistently relied upon a three-pronged test: secularity of purpose, secularity and religious neutrality of the primary effect, and avoidance of excessive entanglement. In the next section of this brief, USCC will show that the remedial instructional services for educationally deprived children that are at issue in this case satisfy the requirements of the triple test and are, therefore, within the constitutionally permissible area of

assistance to the education of children attending church related schools.

B. *Application of the Test.* Although this test is nowhere mentioned in the text of the Constitution, it has been developed by this Court over a period of years in order to harmonize the complex constitutional principles that cases involving education and religion call into play. This Court has consistently rejected the absolutist "no aid to religion" approach to the No Establishment Clause, under which proof of *any* resulting benefit to any religious institution automatically invalidates federal or state legislation. *Everson v. Board of Education, supra,* and *Board of Education v. Allen, supra*; see also *Walz v. Tax Commission, supra.* It is important to keep the historical genesis of this test in mind, in order not to slip into the precise pitfall the test was designed to avoid. Cases involving education and religion involve more than the No Establishment Clause. They also involve educational, parental, student and government interests of the highest constitutional order.

1. *Purpose*

Petitioners concede the secularity of purpose of the challenged provision of Title I of ESEA.[52] Given the legislative history of the Act, which we have already set forth, petitioners could not have done otherwise. Moreover, the fact of that Congress and the state legislatures have honestly been pursuing secular objectives in the

[52]Petitioners' Brief, p. 29.

educational legislation so often challenged before this Court is amply demonstrated by the fact that none of the legislation invalidated in 1971 and 1973 was declared unconstitutional under the "purpose" test.

2. *Effect*

In three cases decided last June (*Nyquist, Sloan* and *Levitt, supra*), this Court invalidated educational legislation from New York and Pennsylvania on the ground that the legislation had the constitutionally impermissible effect of a "direct and substantial advancement of religion." See especially *Committee v. Nyquist, supra* n. 39. This effect occurred both because the only schools that would benefit from the legislation in question would be nonpublic schools (most of which were church related and, in particular, Roman Catholic) and because the types of benefits provided (tuition grants to nonpublic school parents generally or to low-income families in particular; tax benefits for nonpublic school parents generally; maintenance payments for health and safety facilities; reimbursements for the costs of *all* examinations) were not sufficiently limited to the secular aspects of education in church-related schools. As this Court saw the matter, the New York and Pennsylvania legislation provided a special windfall for church related elementary and secondary schools, a windfall that was not and could not be limited in practice to secular education.

None of these elements is present in the instant case. The obvious primary effect of Title I of ESEA is substantial assistance to educationally deprived children, regardless of the school they attend. Because of their numbers, public school children receive the bulk of the

benefit. Because of their need, nonpublic school children participate in the benefit on an equitable and comparable basis. The secularity of the benefit is guaranteed by the statutory provisions that only public school agencies may submit proposals, receive funds and operate the programs. Only public school personnel may teach.

Unlike the programs invalidated in *Lemon, Nyquist, Sloan* and *Levitt*, none of the basic educational costs of a church related elementary and secondary school can be paid for, directly or indirectly, with Title I funds. Moreover, if a church related school has expanded its activities beyond basic education, it still cannot receive Title I funds for its extended activities. Title I funds cannot support or supplement *basic* or *actual* educational costs of any given school. Title I funds can only be used for special education services not already in existence.

Petitioners have contested the "special character" of the teaching services authorized by Title I.[53] They seem to forget that it is not the subject matter, but the student, that makes the services "special." When the petitioners say that the "educationally deprived children are thus normal children who happen to be slow readers,"[54] they exhibit a remarkable ignorance of the academic and psychological damage that chronic slow reading does to a child. Reading is to the mind what eating and exercise are for the body. Permanent slow reading means permanent mental malnutrition.

Congress recognized that special educational services, like remedial reading and arithmetic, were beyond the

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[53] *Id.* at 12-13.

[54] *Ibid.*

capacities, if not the will, of most local public school districts and nonpublic schools. In the best tradition of federal concern for the needy and neglected, Congress devised Title I of ESEA. Given its broad scope and execution, any effect that Title I has on church related schools is strictly secondary and indirect. The primary effect is clearly secular and religiously neutral: the provision of special educational services, completely under public control and operation, to educationally deprived children, regardless of their creed or the school they attend.

3. *Excessive Entanglement*

The doctrine of "excessive entanglement," as developed by this Court, has two facets, administrative and political. The administrative facet prohibits excessive governmental involvement with the educational process operated by church related schools, and particularly excessive governmental surveillance in order to distinguish between what is "secular" and what is "religious" in those processes. The political facet prohibits legislation that has a serious potential of generating political divisiveness along religious lines. *Lemon v. Kurtzman, supra* at 615-24.

With regard to the administrative facet of excessive entanglement, it is quite clear that Title I projects do not involve the government at all with what parochial school teachers teach. Whether a child is educationally deprived or not is determined by standard, objective, religiously neutral tests. Once the determination is made that a child is educationally deprived and that he qualifies for assistance under a Title I project, public school teachers take over the task, under public supervision, of attempting to cure the child's deficiency. The fact that the

public school teachers may do so on church related, school property involves no more forbidden contact with religion than the fact that public nurses provide health care in the school infirmary, or that public educational personnel visit and inspect the school and its operations to ensure compliance with the compulsory education laws and reasonable educational standards. Church related school property is not an enclave upon which public personnel are forbidden to enter.

The publicly employed teacher, moreover, does not suffer from that "inherent conflict" of which this Court spoke in *Lemon v. Kurtzman, supra* at 618-19 (1971). There is no division of loyalties, conscious or unconscious. The Title I teacher has one job to do, and one superior to whom to respond. The fear that the publicly employed teacher might "bootleg" religion into the remedial reading or arithmetic classes, in an effort to curry favor with the church related school authorities, is a makeweight argument which, regardless of intention, is an unworthy aspersion, wholly unsupported by anything in the record of this case, on the fidelity of public employees and the integrity of church related school authorities.

The second facet of the excessive entanglement test is political divisiveness along religious lines. This facet of the entanglement test first appeared in the *Lemon* decision of 1971 and must be carefully compared, as the Court itself did in *Lemon*, with what the Court said in the *Walz* decision of 1970 about the right of the churches to speak out on political issues. It is well known, for example, that many churches gave strenuous support to the civil rights legislation of 1964, 1965 and 1968. It would, however, be a rare lawyer—to say the least—who would suggest that such religious support makes the civil rights legislation unconstitutional.

It would also be the rare lawyer who would suggest that anytime the churches are not unanimous about particular legislation, the legislation is unconstitutional. The Sunday Closing Law Cases settled that matter flatly to the contrary. *McGowan v. State of Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961). So did the more recent selective conscientious objector decisions: *Gillette v. United States* (with *Negre v. Larsen*), 401 U.S. 437 (1971).

Because the "political divisiveness" doctrine obviously raises the most serious questions, both about the other First Amendment rights of churches and church members (speech, press, assembly, association, and petition for redress of grievances) and about the point at which religious controversy paralyzes the potential and authority of the government to take effective secular action, the doctrine must obviously be read in the light of the exact facts to which it has been applied. The only kind of legislation to which the doctrine has been applied is legislation for the benefit of a relatively small number of religious groups, legislation that was unconstitutional for other independent grounds (in *Lemon*, excessive surveillance; in *Nyquist* and *Sloan*, an impermissible primary effect).

Moreover, as we have already pointed out, the net effect of this Court's decisions in the "aid to parochial schools" area has been to hold some forms of assistance constitutional and others unconstitutional. *It cannot be unconstitutional to seek what is constitutional.* If Title I projects are constitutional under the purpose, effect, and first facet of the excessive entanglement test,

as we have shown they are, they are also constitutional under the second facet of the entanglement test. The second facet may be a "broader base" for unconstitutionality (*Lemon v. Kurtzman, supra* at 622), but only when one of the other grounds is already present. Any other doctrine means that it is unconstitutional for the advocates of nonpublic schools to seek what this Court has repeatedly said it is constitutional for the legislatures to give.

C. *Decisive Distinctions from Invalid Forms of Assistance.* Petitioners urge, however, that "insofar as the basic constitutional issues are involved," the present case is indistinguishable from *Lemon-DiCenso–Johnson* (1971) and *Levitt-Nyquist-Sloan* (1973). Petitioners seek to equate special educational services provided under Title I projects with "basically every-day regular instruction in subjects such as reading and arithmetic," and suggest that, at least in practice, the church related schools and not the public authorities will actually be designing, operating and supervising the Title I projects.[55]

There is absolutely nothing in the record of this case to support these contentions by petitioners. We have already noted, in our discussion of the "effect" test, petitioners' belittling of the damaging academic and psychological effects of chronic slow reading on the elementary school child. Again, it is the student, not the subject matter, that makes the educational services "special." Moreover, the educational techniques are also specialized, involving far smaller classes than are customary in public or nonpublic schools and consequently providing far greater individual

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[55]See Petitioners' Brief, pp. 26-27.

attention to the student. *Little Red Riding Hood* may not seem like specialized reading matter, but when a ten-year-old child still can't read it, that child is in serious academic trouble. He will never escape without specialized reading instruction.

Petitioners' suggestion that church related schools, rather than public school districts, will be the real designers, operators and supervisors of Title I projects flies in the face of the statute, regulations and guidelines. Since petitioners have succeeded so far in blocking any special instructional services in nonpublic schools in Missouri, they have no local experience to draw upon.

We have already suggested, in our discussion of the ripeness question, that the lack of any experience in Missouri with the kind of special educational services ordered by the Court of Appeals in this case, plus the great variety of possible designs for such services, makes it inappropriate for the Court at this time to pass on the constitutionality of such services. At this point, however, we make a much more strenuous contention: that it would be a deprivation of respondents' right under the Due Process Clause to their day in court for this tribunal to accept a law review article as a substitute for evidence.

Moreover, petitioners utterly ignore the very basic and constitutionally significant factual distinctions between this case and the "school aid" decisions of 1971 and 1973. In this case, we have a general program aimed at *all* disadvantaged children, not only those in nonpublic schools. In this case there is no support, direct or indirect, of any basic or existing case the money flows only to public agencies, not to nonpublic schools, teachers or parents. In this case all teachers are public employees. All programs are publicly operated, not just publicly supervised or audited. Public

authorities, in order to operate Title I projects, do not have to make any distinctions between what is secular and what is religious in the classes conducted by the nonpublic schools. Finally, ESEA is a federal program aimed at the nationwide problem of educationally deprived children, not a state attempt to keep nonpublic schools within its jurisdiction in a state of financial viability.

The constitutional significance of these factual distinctions is obvious, and has already been discussed in our analysis of the facts and law of this case under the purpose-effect-entanglement test. The generality and totally public character of Title I ESEA projects not only distinguish them from the types of educational assistance declared invalid by this Court in 1971 and 1973, but clearly bring them within the area of assistance declared by this Court at the same time to be constitutionally permissible.

D. *Furtherance of Positive Constitutional Values.* In addition to satisfying the requirements of the purpose-effect-entanglement test, Title I of ESEA promotes several positive constitutional values. The most obvious is assistance to educationally deprived children. The constitutional legitimacy of such an objective is too well established to warrant discussion in this day and age. The inclusion, however, of such children in attendance at nonpublic schools also serves positive constitutional values: the accommodation of the parental rights of all those parents who, for whatever reason, choose to send their children to nonpublic schools; the accommodation of the free exercise rights of those parents who choose church related schools for religious reasons (see *Zorach v. Clauson, supra*); and the accommodation of academic freedom and the role of private institutions in American

education by not adding still another burden of disqualification from governmental assistance on those who choose to attend these schools.

The "school aid" decisions of 1973, including *Norwood v. Harrison*, 413 U.S. 455, establish beyond any shadow of doubt that nonpublic schools do not stand on the same footing with respect to government aid as public schools. The same decisions, however, also establish, equally beyond doubt, that there is an area of permissible assistance. We have shown that Title I ESEA projects are within that area under the purpose-effect-entanglement test. It is a constitutional plus, not a minus, that the permissibility of the inclusion of children attending nonpublic schools in Title I projects will enhance the educational and religious freedom of American parents, children, and teachers and will contribute, at least in some small way, to the survival of pluralism in American education.

CONCLUSION

First, for the reasons stated herein, this *amicus* respectfully requests that the Court affirm the judgment of the Court of Appeals for the Eighth Circuit on the grounds assigned in its majority opinion. Secondly, however, should this Court pass upon the constitutional issue raised by the petitioners, USCC asks that the Court decide that question against the petitioners' claims. Specifically, this *amicus* requests that the Court hold that the authority provided by 20 U.S.C. 241e(a)(2) for publicly employed personnel to perform special, remedial instructional services for the assistance of educationally deprived children on the premises of nonpublic, church related schools during regular school hours, is not in violation of the First Amendment to the Constitution of the United States.

Respectfully submitted,

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